United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

28-7A

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 22485

UNITED STATES OF AMERICA

v.

ERNEST M. MARSHALL,

Appellant

Appeal from the United States District Court

for the District of Columbia

BRIEF FOR APPELLANT

John H. MacVey
P. O. Box 303
McLean, Virginia 22101
Attorney for Appellant
(appointed by the Court)

STATEMENT OF QUESTIONS PRESENTED

The questions presented are:

1. Whether the indictment of defendant was fatally defective so that the prosecution failed to prove the offense as charged.

2. Whether the arrest of defendant and the seizure of a loaded 22 calibre revolver from the person of the defendant were an illegal arrest, search, and seizure because made without probable cause therefor.

3. Whether the sentence of imprisonment for a term of two to six years was in excess of the maximum sentence authorized by law.

The circumstances involving the conviction and sentencing of the said appellant, Ernest M. Marshall, have not previously been before this Court in any other proceeding.

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UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 22485

UNITED STATES OF AMERICA

v.

ERNEST M. MARSHALL,
Appellant

Appeal from the United States District Court

for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Sections 1291 and 1294 of Title 28 of the United States Code to review the final action of the U. S. District Court for the District of Columbia by which the appellant, Ernest M. Marshall, was indicted, tried, convicted, and sentenced to imprisonment for a term of two to six years for the offense of carrying a pistol without a license therefor in violation of 22 D. C. Code 3204.

STATEMENT OF THE CASE

About 12:15 A. M. on January 30, 1968, the appellant, Ernest M. Marshall, (hereinafter called the defendant), was stopped by two police officers, dressed in plain clothes, in the 1300 block of R Street, N.W., Washington, D. C., and was interrogated about his driver's credentials.

In the course of the interrogation, one of the officers noticed a bulge under the sweater of the defendant, and removed a 22 calibre loaded revolver from the person of the defendant. Thereafter, the defendant was placed under arrest on the charge of carrying a concealed dangerous weapon.

After proceedings in the Court of General Sessions, as indicated by the proceedings of the Grand Jury (R. 1), the defendant was indicted on May 2, 1968, for the offense of carrying a dangerous weapon, i.e., a pistol capable of being concealed, without a license therefor (R. 1).

The defendant was tried before a jury on September 5, 1968, and was convicted of the offense as charged (R. 19 - p. 109).

The U. S. Attorney thereafter filed with the trial judge on September 12, 1968 an "Information as to Previous Convictions" (R. 10) whereupon the defendant was sentenced by the trial judge, Judge Oliver Gasch, to imprisonment for a term of two to six years (R. 14).

The transcript of the trial (R. 19) shows that the direct case of the Government consisted of the testimony of the two aforesaid police officers, and three exhibits. The defendant did not testify in his own defense, and his trial counsel did not present any evidence for the defense.

The following significant facts were developed in the trial in the direct case by the Government.

Shortly after midnight, Officer Robert L. Pleger and Officer Thomas E. Johnson were cruising in the 13th Precinct looking for"perpetrators" of felonies, such as street robberies (R. 19 - pp. 20.) Both officers were dressed in plain clothes as members of the "bum squad" (R. 19 - pp. 14, 22, 23). Officer Pleger was driving his own private automobile, a blue and white 1954 Plymouth, with Pennsylvania license tags (R. 19 - p. 24), equipped with police radio equipment (R. 19 - p. 23).

About 12:15 A. M., Officer Pleger observed defendant driving a 1968 Pontiac with Virginia rental plates in the 1300 block of Wallach Place, N. W., which is a short distance north of the 1300 block of R Street, N.W. (R. 19 - p. 20).

Defendant then drove south on 13th Street, N.W., turned right on R Street, which is one-way going west (R. 19 - p. 29) and stopped his car on the north side of R Street near the corner of 14th and R Street, N.W., leaving the rear of the car about five to seven feet from the curb (R. 19 - p. 25).

The police officers followed defendant from Wallach Place, N.W., for about three to four minutes (R. 19 - p. 25) and stopped behind defendant's car when defendant stopped (R. 19 - pp. 24, 25). Defendant turned off the motor (R. 19 - p. 31) but left the lights on, and started south across R Street at a run (R. 19 - p. 26). Defendant had gained the south curb, a distance of about twenty-five feet (R. 19 - p. 31) when Officer Pleger got out of his car, "hollered" at defendant, exhibited his badge, and asked defendant to return (R. 19 - pp. 31, 32, 33). Defendant then stopped, looked, and returned to the north side of the street where Officer Pleger was standing (R. 19 - pp. 19, 33).

At that time, Officer Pleger asked defendant for his driver's permit and rental registration, and defendant produced a driver's permit and rental contract in the name of Johnny Bradford Johnson (R. 19 - p. 41). In the meantime, Officer Johnson also had alighted from the car. The defendant was facing Officer Pleger, who was examining the permit and rental registration and Officer Johnson was on the right side of Officer Pleger and somewhat ahead of Officer Pleger. (R. 19 - p. 35).

While Officer Pleger was examining the driving credentials, Officer Johnson asked the defendant "what the bulge was under his sweater"

(R. 19 - p. 34). Officer Pleger testified repeatedly that the "bulge" was on defendant's left side under the sweater (R. 19 - pp. 16, 35, 37, 39).

"Then Officer Johnson reached back and removed the revolver in question", according to Officer Pleger (R. 19 - p. 37), although the item itself could not be seen (R. 19 - p. 40). Thereafter, the defendant was placed under arrest for carrying a deadly weapon (R. 19 - p. 38, 40).

The testimony of Officer Johnson was very brief in corroboration of the testimony in chief of Officer Pleger (R. 19 - pp. 45-47).

It is most significant to emphasize that neither officer had ever previously seen the defendant (R. 19 - p. 43, 45-47); that neither officer knew the identity of the defendant at the time (R. 19 - pp 42, 43); that neither officer had any reason to believe that the 1968 Pontiac was stolen (R. 19 - p. 26); that neither officer had observed any traffic violation by defendant (R. 19 - p. 21); and neither officer testified that he had observed any offense being committed or about to be committed by defendant in the officer's presence (Total R. 19), although Officer Pleger did testify, without any elaboration, that, when defendant got out of the Pontiac and ran across the street, the defendant "...was very suspicious in the manner he was acting" (R. 19 - pp. 29, 31).

The Government completed its direct case with the development of the foregoing facts. Both officers were then excused and told that each could have a seat in the courtroom (R. 19 - p. 44, 48).

The 22 calibre revolver and its 22 short ammunition had been previously marked for identification through the testimony of Officer Pleger (R. 19 - p. 17) as Exhibits 1 and 2, respectively.

When the Government had completed its direct case against defendant, the defendant's trial counsel then moved to strike all of the testimony by the two police officers on the grounds that the search of defendant by

Officer Johnson was illegal because it was not incident to a lawful arrest; that, in questioning defendant, the police officers did not have any probable cause to make an arrest; and that the arrest of defendant was subsequent to the illegal search which disclosed the concealed loaded 22 calibre revolver.

The trial judge excused the jury and a long legal argument occurred (R. 19 - pp 45-67). After a discussion of the decision in Terry v. Ohio, 392 U.S. 1 (1968), the trial judge allowed the Government prosecutor to recall Officer Johnson to develop more facts to explain the officer's actions (R. 19 - pp. 63, 64). Thereafter, defense trial counsel recalled Officer Pleger (R. 19 - p. 83).

It is emphasized that, upon recall, the police officers significantly changed their testimony given on the Government's direct case, and gave testimony contradictory to each other.

Officer Johnson, recalled by the Government prosecutor, testified that the defendant

> "...was bringing his hand back like he was attempting to go for something. I was standing...to his left rear, and I noticed a bulge under his sweater. Then I said, 'Hold it. Have you got a gun'. He didn't say anything. He just raised his hands as high as he could raise them, so you could see the holster then. Then I reached in and pulled out the gun." (R. 19 - pp. 69-70).

Even more significantly, Officer Johnson testified on recall that the bulge and visible holster were over the right hip pocket of the defendant (R. 19 - pp. 71, 72, 73, 74, 75, Cf., Pleger, R. 19 - pp. 16, 35, 37, 39). After Officer Johnson removed the gun, the holster remained attached to the defendant's belt or pants (R. 19 - pp. 74-82.)

Defense trial counsel then recalled Officer Pleger, and the following significant exhange occurred:

> "Q. As I understand your testimony which you seem sure of at the time, you were observing likewise the activity of Mr. Johnson in reference to Mr. Marshall? Is that correct?

> "A. Late in the evening, Officer Johnson had asked the defendant what the bulge was in his sweater, and right away we had so many policemen shot in that area, that was mainly what we were looking out for at that time..." (R. 19 - p. 83; cf, Pleger, R. 19 - p. 20).

Further, Officer Pleger did not have any recollection of what the defendant did after Officer Johnson asked about the "bulge" (R. 19 - p. 85); nor could Officer Pleger recall whether the defendant made any sudden, overt gestures of any kind at that time (R. 19 - p. 86), although he admitted that he thought he would remember such gestures (R. 19 - p. 87).

On cross-examination by the Government prosecutor, Officer Pleger testified that the defendant did not raise his hands in surrender (R. 19 - p. 88) in contradiction of Officer Johnson (R. 19 - pp. 69, 70).

The trial judge then overruled the motions by defense counsel and admitted the 22 calibre revolver in evidence, and the ammunition, under the authority of Terry v. Ohio, supra (R. 19 - pp. 89-92), and the jury delivered a verdict of guilty (R. 19 - p. 109).

STATUTES INVOLVED

22 D. C. Code sec. 3204

> "No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years."

22 D. C. Code sec. 3215

> "Any violation of any provision of this chapter for which no penalty is specifically provided shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or both."

18 U. S. Code sec. 1

> "Notwithstanding any Act of Congress to the contrary:
> "(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
> "(2) Any other offense is a misdemeanor.
> "(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

14 D. C. Code sec. 305

> "A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters. To prove the conviction of crime the certificate, under seal, of the clerk of the court wherein proceedings containing the conviction were had, stating the fact of conviction and for what cause, is sufficient."

23 D. C. Code sec. 306

> "(a) Arrests without a warrant, and searches of the person and seizures pursuant thereto, may be made for violation of any section listed in subsection (b) by police officers, as in the case of a felony, upon probable cause that the person arrested is violating the section involved at the time of the arrest.
> "(b) Subsection (a) shall apply with respect to section 22-3601 (possession of implements of crime), section 22-3203, 223204, and 22-3214, providing for the control of dangerous weapons in the District, and section 22-1502 (possession of lottery tickets).
> "(c) Arrests without a warrant, and searches of the person and seizures pursuant thereto, may be made for violation of section 22-2202 (petit larceny), by police officers, as in the case of a felony, upon probable cause that the person arrested has in his possession at the time of the arrest, property taken in violation of that section.
> "(d) No evidence discovered in the course of any arrest, search, or seizure authorized by this section shall be admissible in any criminal proceeding against the person arrested unless at the time of such arrest he was violating one of the sections referred to in subsection (b) or had in his possession property taken in violation of the section referred to subsection (c)." (emphasis supplied).

STATEMENT OF POINTS

The Court below erred as follows:

1. In admitting the 22 calibre revolver (Exhibit 1) and its 22 short ammunition (Exhibit 2) in evidence and in failing to make a judgment of

acquittal of defendant as a matter of law because such exhibits were obtained by the police officers from the person of the defendant by an illegal arrest and by an illegal search without probable cause and without a warrant.

2. In sentencing defendant to imprisonment for a felony for a term of two to six years when the Government prosecutor failed to prove as a matter of law any prior conviction of defendant of the misdemeanor of carrying a dangerous weapon without a license therefor and failed to prove any prior conviction of defendant of a felony, so that, in any event, the maximum sentence which should have been imposed should not have excceded imprisonment for more than one year, or a fine of not more than $1,000, or both.

SUMMARY OF ARGUMENT

Point 1

Counsel for appellant has prepared a short memorandum of law for the convenience of the Court, which is attached to this brief as Exhibit 1 and which is made part of this brief. The summary of argument is based upon the propositions, court decisions and authorities cited in Exhibit 1.

Appellate counsel for defendant respectfully submits that the total testimony of the two police officers, Pleger and Johnson, clearly shows that, when they first observed defendant driving a rented Pontiac in the 1300 block of Wallach Place, N.W., the officers did not have any probable cause whatsoever to believe that the defendant, whom they did not know and whom they had never seen previously, was committing the offense of carrying a concealed dangerous weapon, i.e., a 22 calibre loaded revolver without a license therefor. Nor did the officers acquire by observation any facts giving them such probable cause when they followed defendant several blocks for three or four minutes.

At this point, appellate counsel respectfully emphasizes that Officer Pleger admitted that a large building is on the corner of 13th and R Streets, N.W. (R. 19 - p. 29), and appellate counsel requests the Court to take judicial notice of the Telephone Directory, District of Columbia and Maryland Section, Washington Metropolitan Area. Such directory shows the address of the Charles Hotel at 1338 R Street, N.W., almost directly across the street from the point where defendant parked his car with the lights on, and the motor turned off.

Appellate counsel further respectfully contends that, when defendant had reached the south curb of R Street and Officer Pleger "hollered" at defendant and ordered defendant to return, defendant at that time submitted to the police officer's authority and was at that time arrested or "seized" by Officer Pleger.

Appellate counsel further contends that, when Officer Pleger "hollered" at defendant and ordered defendant to return, neither officer had any probable cause to believe that defendant was carrying a concealed loaded revolver without a license therefor, and that the demand to see defendant's driver's permit and car rental contract was a sham or pretext on the part of the police officers to justify their illegal arrest of defendant without probable cause, since the officers admitted that they had not observed any traffic violations by the defendant.

Appellate counsel respectfully emphasizes that, after the Government had completed its direct case the police officers were excused as witnesses and allowed to take seats in the courtroom. After extensive legal argument as to the legality of the arrest and search of defendant, the police officers conferred with the prosecuting attorney and, upon being recalled as witnesses, obviously changed their prior testimony in a clumsy effort to fit the circumstances into both the "plain view" cases giving probable cause to arrest for

carrying a revolver and the self-protection "frisk" authorized by Terry v. Ohio, 392 U.S. 1, but a reading of the testimony of the two officers upon their recall shows that they contradicted each other, and also mysteriously moved the 22 calibre revolver from defendant's left side to defendant's right side.

Appellate counsel accordingly respectfully submits that all of the testimony of Officers Pleger and Johnson after their recall is not credible and that this appeal therefore must be determined on the basis of the testimony before the beginning of the legal argument (R. 19 - p. 48). Appellate counsel therefore respectfully contends that the Government's direct case (R. 19 - pp. 1-48) does not establish any probable cause for the police officers to believe that defendant either was carrying a revolver without a license therefor or was carrying a concealed weapon at the time of his arrest, as above stated, and that accordingly both the arrest and the subsequent search are illegal.

Further, since the police officers' testimony after recall is not credible, the trial judge erred in admitting the 22 calibre revolver and its ammunition in evidence under the self-protection justification of Terry v. Ohio, supra.

Consequently, appellate counsel respectfully submits that the trial judge should have excluded the 22 calibre revolver and its ammunition from evidence and that he should have made a judgment of acquittal for the defendant as a matter of law.

Point 2

Appellate counsel submits that, if the Court hold that the arrest and search of defendant were legal, then the Government failed to prove any prior convictions of defendant of the offense of carrying a pistol or revolver without a license, since the "Information" filed by the U. S. Attorney with

the trial court, is not legal proof. Accordingly, the defendant should have been convicted only of a misdemeanor and should have been sentenced not in excess of the maximum penalty of one year imprisonment, or $1,000 fine, or both, imposed by 22 D.C. Code 3215 for conviction of such a misdemeanor, so that the sentence imposed upon defendant by the trial judge of imprisonment for term of two to six years is illegal.

ARGUMENT

Point 1

The Court below erred in admitting the 22 calibre revolver and its 22 short ammunition in evidence and in failing to make a judgment of acquittal of defendant as a matter of law because the revolver and ammunition were obtained by the police officers from the person of the defendant by an illegal arrest and by an illegal search without probable cause and without a warrant.

(Appellate counsel requests that the Court read the indictment - R. 1; the plea of defendant - R. 3; the verdict of the jury - R. 6; and the entire transcript of the trial - R. 19 - pp. 1 - 112).

The provisions of 22 D. C. Code 3204 clearly specify two types of offenses, both of which are misdemeanors for a first offense: (1) carrying a pistol without a license therefor whether such pistol is carried either openly or concealed; and (2) carrying any concealed dangerous weapon, whether a pistol, knife, or other dangerous weapon, such as a sword cane.

A. The Indictment

Appellate counsel respectfully submits that the indictment is ineptly drawn in that, on the facts of record, the indictment charges an impossibility.

The total testimony of record shows that Officer Johnson, while Officer Pleger was examining defendant's driver's credentials, reached under defendant's

sweater and removed the loaded 22 calibre revolver from a holster attached to defendant's belt or pants. Unlike Kendrick v. United States, 99 App. D.C. 173; 238 F 2d 34 (1956), defendant never drew or displayed openly the loaded revolver in the presence of the police officers. Therefore, defendant, on the facts of record, could not possibly have carried the loaded revolver both concealed and openly in the same sequence of events.

But, the formal indictment charges that defendant "did carry, openly and concealed on or about his person, a dangerous weapon, capable of being so concealed, that is, a pistol, without a license therefor issued as provided by law" (R. 1).

It is well established that the Government has the burden of proving probable cause to justify a search without a warrant, and if the Government fails to maintain such burden of proof, the defendant must be acquitted of the offense charged.

> "There can no longer be any doubt that the Fourth Amendment's requirement of reasonableness demands that a valid search warrant be obtained prior to a search unless the situation comes within one of 'the carefully defined classes of cases' constituting exceptions to the general warrant requirement (citing cases). The burden is on one invoking an exception to the warrant requirement to produce facts bringing the case with the exception..." Barnett v. United States, 384 F 2d 848 at 859 (5th Cr., 1967).

The total record in this case is completely lacking in any evidence showing that the two police officers had any reason to believe or know at the time of the arrest and search of the defendant, and the seizure of the loaded revolver, as required by 23 D. C. Code 306, that defendant did not have a license to carry a revolver, particularly since both police officers had not seen or heard of defendant previously (R. 19 - p. 43).

Appellate counsel accordingly respectfully submits that the Government completely failed in its burden of proving probable cause to arrest defendant for the offense as charged by the indictment and that therefore the trial judge should have directed that defendant be acquitted of the offense as charged by

the indictment

B. The Illegality of the Arrest and Search

The trial of the defendant in the Court below actually had two very different phases, and the question of the illegality of the arrest and search must be analyzed in terms of the different testimony adduced from the two officers in the two different phases.

The first phase of the trial was the Government's direct case consisting of the testimony of the two police officers, and the marking for identification of 22 calibre revolver and ammunition as Exhibits 1 and 2, respectively, after which the two police officers were excused and authorized to take seats in the court room (R. 19 - pp. 44, 48).

The second phase of the trial occurred after the extensive legal argument (R. 19 - pp. 48-67) with the recall of the two police officers for further testimony concerning only the facts of the search of the defendant.

(1) The Government's Direct Case - The total evidence of record shows that the officers first observed defendant driving a 1968 Pontiac with Virginia rental plates in the 1300 block of Wallach Place, N.W. They followed defendant for three or four minutes for several blocks until defendant parked rather ineptly in the 1300 block of R Street, N.W., got out of the car, and started at a trot or run across R Street toward the Charles Hotel at 1338 R Street, N.W., and an alley (R. 19 - pp. 29-31, 68).

R Street at that point is a one-way street going west toward 14th Street. It is a narrow street with parking permitted only on the north side of the street (R. 19 - p. 68).

Defendant had gained the south side of R Street, a distance of about 25 feet from defendant's car, when Officer Pleger, having stopped behind defendant's car, got out of the Pleger car, "hollered" at defendant and exhibited his badge. The defendant, without stopping, looked back, then stopped, and

then returned to the point where Officer Pleger was standing on the left side of the Pleger car. In the meantime, Officer Johnson also left the Pleger car and came to stand on the right side of Officer Pleger.

Officer Pleger asked defendant for defendant's driver's permit and car rental contract, which defendant produced. While Officer Pleger was examining such driver's credentials, Officer Johnson testified that he observed a bulge under the sweater of defendant on defendant's left side. Officer Johnson said, "Hold it. Have you got a gun?", and Officer Johnson suddenly reached under defendant's sweater and removed the loaded 22 calibre revolver. Thereafter, the two officers placed defendant under arrest for the offense of carrying a dangerous weapon (R. 19 - pp. 38, 40).

Appellate counsel respectfully submits the following propositions:

(a) The officers started following defendant and stopped defendant, requiring defendant to return to exhibit defendant's driver's credentials, solely on "mere suspicion", the reasons for which, if any, are completely unstated anywhere in the record other than defendant's act of running across the street.

(b) The defendant was "arrested" as a matter of law by Officer Pleger when defendant stopped and submitted to the police officer's authority by returning to the point where Officer Pleger was standing.

(c) At the time of such arrest, neither police officer had any probable cause whatsoever to believe that defendant had committed or was about to commit any offense of any kind in their presence, whether such offense be a traffic violation or carrying a concealed dangerous weapon.

(d) Since neither police officer had any probable cause to believe that defendant was carrying a concealed dangerous weapon at the time of arrest, as required by 23 D. C. Code 306, such arrest was illegal and therefore the subsequent search was also illegal. The seizure by Officer Johnson of the loaded 22 calibre revolver is the "fruit of the poisonous tree" and was therefore

not admissible in evidence against the defendant, so that defendant should have been acquitted by the trial judge.

With all due respect, appellate counsel suggests that a reading of the pertinent cases suggests that courts tend to move the time of arrest back and forth in the time sequence of events in a particular encounter in order to justify a search of the accused (cf., Mr. Justice Harlan, concurring in Sibron v. New York, 392 U.S. 40 at 77 (1968).

However, appellate counsel, in all sincerity, cannot differentiate the facts of this case, as shown by the Government's direct case, from the facts in the following cases where the courts found no probable cause for arrest, and which appellate counsel urges are controlling in this case.

In Kelley v. United States, 111 U.S. App. D.C. 396; 298 F 2d 310 (1961), a police officer saw the accused, a known felon and narcotics addict, in a restaurant on 7th Street, N.W. The police officer went into the restaurant, exhibited his badge to the accused, and said, "Come outside. I want to talk to you."

The accused submitted and went outside with the police officer. There, the police officer asked the accused what the accused had in each pocket, and the accused replied. Then the officer said, "What is that bulging out of your change pocket?" The accused answered, "I have some marijuana cigarettes."

The police officer then told the accused to take the cigarettes out of his pocket and hand them to the officer. Then, the officer arrested and searched the accused, who was convicted on the basis of the marijuana so obtained by the police officer.

The Court approved the definition of arrest set forth in the instruction to the jury in Coleman v. United States, 111 U.S. App. D.C. 210; 295 F 2d 555 (1961) which is:

> "You are instructed that for there to be an arrest it is not necessary that there be an application of actual force, manual

> taking of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest. It is sufficient if the person understands that he is the power of the one arresting, and submits in consequence.

The Court held that the accused was clearly under arrest when he got outside the restaurant in submission to the officer's demand; and that not one shred of evidence indicated any probable cause for such arrest by the officer. Accordingly, the subsequent search was illegal and the accused's conviction was reversed.

In United States v. Mitchell, 179 F. Supp. 636 (D.C.D.C., 1959), a police officer began to interrogate the accused without any reason to suspect the accused of a crime and then took the accused to a call box where the officer made a check on reports of house breakings in the area. The Court held that the accused was arrested when taken by the police officer to the call box. Since the police officer did not have any probable cause to make such arrest, the arrest was illegal.

In United States v. Jenkins, 276 F. Supp. 958 (D.C.D.C., 1967), two police officers riding in a police car saw the accused walking on the street having what appeared to be a gun butt sticking from the left hip pocket of the accused. Before getting out of the police car, one officer shouted, "I have something faster than you have." As a result, the accused stopped at the curb. The officers then got out of the police car, seized the accused's gun, and formally arrested the accused for carrying a dangerous weapon.

The Court held that the accused was arrested when the accused submitted to police authority by stopping at the curb, and that seeing the gun butt in plain view before the officer shouted was probable cause to make the arrest.

In Rios v. United States, 364 U.S. 253 (1960), two California police officers, dressed in plain clothes riding in an unmarked car, saw a taxicab standing about 10 PM in a parking lot in an area known for narcotics activity. The accused was seen to look up and down the street and then enter the taxicab.

As in this Marshall case, the officers had not seen the accused previously and did not know the identity of the accused, nor were they searching for a participant in any particular crime.

However, the officers, apparently on suspicion, followed the taxicab for about two miles. Then, when the taxicab stopped for a traffic light, the officers approached the taxicab and one identified himself as a police officer. The record thereafter was not clear, but the accused was discovered to have heroin and was convicted.

The Supreme Court reversed the conviction and ordered a new trial, saying:

> "...The seizure can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant. Here justification is sought upon the claim that the search was an incident to a lawful arrest. Yet upon no possible view of the circumstances revealed in the testimony of the Los Angeles officers could it be said that there existed probable cause for an arrest at the time the officers decided to alight from the car and approach the taxicab in which the petitioner was riding (citing cases). This the Government concedes.
>
> "If, therefore, the arrest occurred when the officers took their positions at the doors of the taxicab, then nothing that happened thereafter could make the arrest lawful, or justify a search as its incident (citing cases). .....The validity of the search thus turns upon the narrow question of when the arrest occurred, and the answer to that question depends upon an evaluation of the conflicting testimony of those who were there that night..." (emphasis supplied), at pp. 261, 262.

In Sibron v. New York, 392 U.S. 40, the accused was convicted of unlawful possession of heroin after a search. The facts were that the police officer had observed Sibron continually for eight hours on Broadway and saw Sibron converse with narcotics addicts known to the police officer. Late in the evening, Sibron entered a restaurant and spoke to three more known addicts in the restaurant, but the officer did not hear any of the conversations and did not see anything being passed between Sibron and the others.

When Sibron was eating, the officer approached Sibron and told Sibron to come outside. There, the officer said, "You know what I am after."

Sibron mumbled something and reached into his pocket. Simultaneously, the officer thrust his hand in the same pocket and discovered several glassine envelopes which contained heroin.

The Supreme Court reversed the conviction of Sibron, saying:

> "...The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case...
>
> "...
>
> "...it is clear that the heroin was inadmissible in evidence against him (Sibron).....Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification (citing cases)..." at pp. 59, 62, 63.

Examining the facts of this case in light of the foregoing five cases, appellate counsel respectfully submits that the Government's direct case completely failed to show any probable cause of any kind for arresting the defendant; that the police officers were acting on "mere suspicion", which is not probable cause; that the demand to see defendant's driving credentials was a pretext and a sham to justify further investigation by the police officers of their unstated suspicions; and that defendant was arrested without probable cause when he submitted and returned to Officer Pleger, as ordered to do. Therefore, the subsequent search was illegal; the trial judge should have excluded the revolver from evidence; and defendant should have been acquitted on the basis of the Government's direct case.

Obviously, nothing remotely exists to support probable cause to believe the defendant was carrying a concealed weapon simply because defendant parked his car across the street from a long-established hotel well-known in the area and because the defendant then trotted or ran across the street toward the hotel and alley. For all that the police officers knew at the time of the arrest, the defendant might have been answering an urgent need to go to

the men's room.

(2) The Government's Case After Recall of the Police Officers for Further Testimony

As described in the Statement of the Case, an extensive legal argument occurred after completion of the Government's direct case concerning the legality of the arrest and search. Then the trial judge, on the authority of Terry v. Ohio, supra, allowed the Government prosecutor to recall one of the police officers to give more detailed testimony concerning the facts of the arrest and search.

At the outset, appellate counsel emphasizes that such recall of the police officers, both after completion of the Government's direct case and after oral legal argument, was a matter within the discretion of the trial judge. Since defendant's trial counsel did not object to such recall and in fact himself recalled Officer Pleger, appellate counsel has not assigned the recall of the two police officers as reversible error. Cf, 6. Wigmore on Evidence (3rd ed.), sec. 1877; 1989.

The Terry Case

(i) The U.S. Supreme Court, in its significant decision in Terry v. Ohio 392 U.S. 1 (1968), has created a further exception where a warrantless search without a prior arrest is justified. In the Terry Case, the Court held that a police officer, who is investigating suspicious circumstances and who has probable cause to fear that the accused is carrying a dangerous concealed weapon, may, for the protection of the police officer, make a limited search of the person of the accused (a "frisk" or "pat-down") and a weapon discovered in the course of such limited search for the self-protection of the investigating police officer is admissible in evidence against the accused.

In the Terry Case, an experienced police officer observed three men about 2:30 P.M. in Cleveland apparently "casing" a store in preparation for an

armed robbery. The officer watched their actions for about 10-12 minutes and then approached them for interrogation, although the officer had not previously seen the men and had no information about them other than his observations.

When the men "mumbled something" in answer to the officer's questions, the officer seized Terry, spun him so Terry was between the officer and the other two men, and felt the outside of Terry's overcoat. Such "pat-down" disclosed a pistol. The officer then took the three men into a store, where he removed a pistol from Terry's overcoat and also "patted-down" the outside clothing of the other two men, finding another pistol on another man. The men were then arrested and charged with carrying concealed weapons and were later convicted. It is emphasized that the limited search occurred and the pistols discovered without any probable cause for making an arrest.

The Court upheld the conviction, saying:

"...a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest...

"...

"The crux of this case, however, is...whether there was justification for McFadden's (the police officer) invasion of Terry's personal security by searching him for weapons in the course of that investigation...

"...

"...there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.

"...the sole justification of the search in the present situation is the protection of the police officer...

"...

"We merely hold today that where a police observes unusual conduct which leads him reasonably to conclude in light of his

> experience that criminal activity may be about and that the persons with whom he is dealing may be armed and presently dangerous; where... he identifies himself as a policeman...; and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own...safety; he is entitled for the protection of himself...to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment and any weapons seized may properly be introduced in evidence against the person from whom they were taken." at pp. 22, 23, 27, 29, 30.

(ii) The Importance of Sequestration of the Witnesses with Respect to Their Credibility

At this point, appellate counsel emphasizes that, as each police officer completed his testimony in the presentation of the Government's direct case, he was told by the trial judge that he could have a seat in the court room (R. 19 - pp. 44, 48). From this permissive statement, the necessary implication of the record is that the two police officers had previously been sequestered after the trial began.

Wigmore, the great authority on the law of evidence, makes these pertinent comments in 6 Wigmore on Evidence (3rd ed.):

> Sec. 1830. The sequestration of witnesses on the same side prevents one witness from teaching a subsequent witness, and it also exposes differences in testimony which show perjury, since, if true, all witnesses would all say the same facts.
>
> "...But when all allowances are made, it remains true that the expedient of sequestration is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice...." at p. 354.
>
> "Sec. 1830. A few Courts concede that sequestration is demandable as of right. But the remainder, following the early English doctrine, hold it grantable only in the trial Court's discretion: declaring usually, however, that in practice it is never denied, at any rate for an accused in a criminal case. There is no reason for a distinction between civil and criminal cases: successful perjury is an equally deplorable result, in whatever form it overwhelms its victims." at p. 359.

The validity of the quoted statements is demonstrated by what the record shows occurred at the trial.

During the extensive legal argument, the trial judge took a ten minute recess to permit the Government prosecutor to obtain the Sibron Case, supra (R. 19 - pp. 60, 61). During that time, the Government prosecutor conferred with one of the officers out of the court room (R. 19 - p. 64). The trial judge then stated that he would give the Government prosecutor an opportunity to make or establish further evidentiary basis for the action taken by the officer (R. 19 - p. 64).

Defense trial counsel did not specifically object, but he did say:

> "I would have no objection whatsoever to recalling the officer to inquire about that purpose if I can be assured that he was being called in a candid fashion...It lendsitself to a great possibility, if not probability, of the purpose of fully designing, aligning his answers and his testimony so that the testimony would comport with the requirements of the law itself." (R. 19 - pp. 64, 65).

The trial judge stated he would not make such an assumption at that time (R. 19 - p. 65), whereupon the Government prosecutor recalled Officer Johnson, who seized the revolver, rather than his chief witness on the direct case, Officer Pleger, who made the arrest (R. 19 - p. 67).

Then, defense trial counsel recalled Officer Pleger (R. 19 - p. 83).

Appellate counsel respectfully submits that the two police officers, in their total testimony upon recall, did change their previous testimony in an effort to fit the circumstances into both the legal doctrines of the "plain view" cases, and also into the new exception authorized by the Terry Case, supra. In doing so, the two police officers contradicted each other and also contradicted the previous testimony of Officer Pleger. Accordingly, appellate counsel submits respectfully that the testimony of both police officers on recall is not credible and that this appeal therefore must be decided only on the testimony of the two police officers on the Government's

direct case before the beginning of the oral legal argument.

A reading of the entire testimony of both Officers Johnson and Pleger on recall in comparison to their testimony on the direct case is necessary to obtain the total flavor of how extensively the officers changed their previous testimony, and appellate counsel respectfully requests the Court to do so.

For example, Officer Johnson testified that he observed a "bulge" under defendant's sweater,

> "...then I said, 'Hold it. Have you got a gun?' He didn't say anything. He just raised his hands as high as he could raise them, so you could see the holster then. Then I reached in and pulled out the gun". (R. 19 - p. 69)

Then, on cross-examination, Officer Johnson admitted the "bulge" could have been something else (R. 19 - p. 73), and repeated that the "bulge" was on defendant's right side in the right hip pocket of defendant (R. 19 - pp. 71, 72, 74), in contradiction of Officer Pleger, who testified previously that the "buldge" was on defendant's left side (R. 19 - pp. 16, 36, 37, 39).

In contrast, Officer Pleger, on recall by defense counsel, gave the following unresponsive and practically incoherent reply to a question by defense trial counsel:

> "Late in the evening, Officer Johnson had asked the defendant what the bulge was in his sweater, and right away we had so many policemen shot in that area, that was mainly what we were looking out for at that particular time. I couldn't see because he had his back away from me...." (R. 19 - p. 83. Cf., Pleger, R. 19 - p. 20).

But, Officer Pleger could not remember any sudden, overt gestures of any kind by the defendant, although he admitted that he likely would remember if such gestures had been made (R. 19 - pp. 85, 86, 87).

Even more important, Officer Pleger contradicted Officer Johnson by testifying that, to Pleger's knowledge, the defendant did not raise his hands in surrender (R. 19 - p. 88).

The trial judge then admitted the revolver and its ammunition in evidence under the authority of the Terry Case, supra (R. 19 - p. 89)

(iii) Inapplicability of the Terry Case to the Facts of This Case

Appellate counsel respectfully submits that the facts of this case, as shown by the entire testimony of record, clearly do not come within the newly-created exception of the Terry Case, supra, allowing a police officer to make, for his own self-protection, a warrantless search for concealed weapons without first having probable cause to make an arrest.

First, the record is completely devoid of any evidence showing that the defendant was engaging in any suspicious activities suggesting that a crime was about to be committed by defendant. In Terry, the three suspects did engage in such suspicious activities.

Second, in Terry, one police officer was confronting three men, whereas in this case one defendant was being confronted by two armed police officers.

Third, the defendant had submitted to the police authority in this case by returning across the street.

Fourth, although the two officers disagreed as to whether defendant raised his hands in surrender, the complete testimony on recall clearly fails to show any probable cause for the officers to believe that they were in danger of being attacked by the defendant so that a search of defendant was justified for the self-protection of the police officers. In this connection, it is rediculous to assume that the defendant, armed only with a miniscule 22 calibre revolver, would attack two police officers, both armed with 38 calibre revolvers, particularly when one of the officers (Johnson) was behind and to the left of the defendant.

For the foregoing reasons, appellate counsel respectfully requests the Court to hold that the arrest and subsequent search were both illegal, so that the trial judge should have made a judgment of acquittal of defendant.

Point 2

The Court below erred in sentencing defendant to imprisonment for a felony for a term of two to six years when the Government prosecutor failed to prove as a matter of law any prior conviction of defendant of the misdemeanor of carrying a pistol or revolver without a license therefor and failed to prove any prior conviction of defendant of a felony, so that, in any event, the maximum sentence which should have been imposed should not have exceeded imprisonment for more than one year, or a fine of $1,000, or both

> (Appellate counsel respectfully requests the Court to read the "Information as to Previous Convictions" filed with the trial court (R. 10), and the sentence of defendant by the trial judge (R. 14)"

The defendant did not take the witness stand to testify in his own defense, and the record is completely barren of any evidence showing any interrogation or admission by defendant of any prior conviction for carrying a pistol without a license therefor, or of any prior conviction of any other felony. Cf., Kendrick v. United States, 99 U.S. App. D.C. 173 (1956).

The provisions of 22 D.C. Code 3204 clearly specify that a second conviction for the misdemeanor of carrying a pistol or revolver without a license therefor changes the offense from a misdemeanor to a felony (cf., 18 U. S. Code, sec. 1) having a possible maximum sentence ten times greater than the maximum sentence for a first offense by such misdemeanor.

The "Information as to Prior Conviction" (R. 10) clearly is not legal proof of any prior convictions of any kind but is merely a hearsay statement on the part of the U. S. Attorney. Consequently, appellate counsel respectfully submits that the decision in Jackson v. United States, 85 U.S.App.D.C. 328 (1955) is controlling in this case.. (To same effect as Jackson Case, see Burrell v. United States, 223 A 2d 377 (D.C.App. 1966), and compare, the

method for legally proving a prior conviction in order to impeach the credibility of a defendant specified by 14 D. C. Code 305.)

CONCLUSION

For the foregoing reasons, appellate counsel respectfully submits that the defendant should have been granted a judgment of acquittal by the trial judge; and that, in any event, assuming that defendant were properly convicted of the offense as charged by the indictment, the maximum legal sentence for such offense should not have exceeded imprisonment for more than one year.

Respectfully submitted,

John H. MacVey
P. O. Box 303
McLean, Virginia 22101
Attorney for Appellant
(appointed by the Court)

Exhibit 1 of Brief for Appellant

MEMORANDUM OF LAW FOR THE COURT SUMMARIZING APPLICABLE LEGAL PRINCIPLES AND LEADING CASES CONCERNING SEARCHES AND SEIZURES BY POLICE OFFICERS WITHOUT A WARRANT THEREFOR

Counsel for appellant feels that the Court can better instruct counsel concerning the law with respect to illegal arrests, searches and seizures than vice versa. This memorandum accordingly has been prepared solely for the convenience of the Court in its consideration of this appeal.

The Fourth Amendment of the U. S. Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

A long line of court decisions have established the legal principle that a police officer can make a legal arrest or "seizure" of an individual without a warrant upon probable cause to believe that the individual has committed or is about to commit a crime and that the police officer immediately thereafter can make a search of the person of the arrested individual as a subsequent incident of the lawful arrest. Such seizures and searches are deemed reasonable as matter of law. Accordingly, evidence discovered by such subsequent search is properly admissible in evidence against the arrested individual.

An absolute essential to justify both the arrest or "zeizure" of the individual and the search of the person and effects of the arrested individual without a warrant therefor is the <u>prior</u> existence of facts causing the police officer to have probable cause to believe that a crime

was being committed or about to be committed by the arrested individual. If such probable cause does not first exist, then the arrest and search are illegal and, under the "fruits of the poisonous tree" doctrine, evidence of criminal acts by the arrested individual obtained by either such illegal arrest or illegal search cannot be used against the individual to convict the individual of a crime.

Accordingly, courts have repeatedly held that lawful arrest ("seizure") must precede the search and that a search without probable cause which does in fact disclose evidence of crime cannot justify a subsequent arrest based upon evidence obtained by such prior search.

As recently stated by Chief Justice Warren,

> "Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct..." Terry v. Ohio, 192 U. S. 1 at p. 12 (1968);

and again by Chief Justice Warren,

> "It is axiomatic that an incident search may not precede an arrest and serve as part of its justification...." Sibron v. New York, 392 U. S. 40 at p. 63 (1968)

and again,

> "It is a question of fact precisely when, in each case the arrest took place..." Sibron v. New York, supra, at p. 67.

However, Mr. Justice Harlan, concurring in the Sibron opinion, and Judge Skelly Wright in Bailey v. United States, 128 U. S. App.D.C. 354; 389 F 2d 305 (1968), have both emphasized that, in face to face street encounters, it is irrelevant whether the arrest or search first occurred, as long as probable cause to arrest first existed before any search or arrest was made.

As Mr. Justice Harlan said:

> "Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search...

> There is no case in which a defendant may validly say, 'Although the officer had the right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards.'
>
> "...an officer who does have probable cause may of course arrest and search immediately. Hence while certain police actions will undoubtedly turn an encounter into an arrest requiring antecedent probable cause, the prosecution must be able to date the arrest as early as it chooses following the obtaining of probable cause..." Sibron v. New York, supra, at p. 77.

The provisions in 23 D. C. Code 306 authorizing police officers to make arrests, searches, and seizures without a warrant for the offense of carrying a dangerous concealed weapon, or a pistol without a license therefor, is clearly a restatement of legal principles established by the case law of court decisions.

That section provides that a police officer may arrest an individual for the offense of carrying a pistol or revolver without a license therefor, or a concealed dangerous weapon, only upon probable cause existing at the time of the arrest causing the officer to believe that the arrested individual was in fact carrying a concealed dangerous weapon, or a pistol without a license therefor. The police of the District of Columbia, of course, must obey the law of the District of Columbia.

Accordingly, a crucial question in this appeal is precisely when did the arrest or "seizure" of the defendant occur.

The following propositions appear to be firmly established in the District of Columbia by court decisions.

1. A police officer may investigate suspicious circumstances and may interrogate a citizen about such circumstances, and such detention and interrogation is not a "seizure" or an arrest.

Terry v. Ohio, supra, at p. 22 (1968)

White v. United States, 222 A 2d 843 (D.C.App. 1966)

2. Police officers, having the duty to enforce the traffic laws, may, at any time, ask an individual for his driver's permit and car registration, and a detention and interrogation for such a purpose are not an arrest.

Mincy v. District of Columbia, 218 A 2d 507 (D.C.App. 1966)

United States v. Carter, 275 F. Supp. 769 (D.C.D.C. 1967)

3. When, in the course of routine investigation of suspicious circumstances or examination of driver's credentials, evidence of crime comes within the "plain view" of the police officer, then the police officer has probable cause to arrest the individual for the crime indicated by the object in "plain view" and may then and there arrest and search the individual.

12 D.C. Code Encyclopoedia: Search Warrants - Arrest
Sec. 23-306; par. 5

Washington v. United States, 401 F 2d 915 (D.C.Cir, 1968)

Washington v. United States, 397 F 2d 705 (D.C.Cir, 1968)

Conyers v. United States, 237 A 2d 838 (D.C.App., 1968)

United States v. Carter, 275 F. Supp 769 (D.C.D.C., 1967)

Bailey v. United States, 128 U.S.App.D.C. 354; 389 F 2d 305 (1968)

United States v. Jenkins, 276 F. Supp 958 (D.C.D.C., 1967)

Jefferson v. United States, 121 U.S.App.D.C. 279; 349 F 2d 714 (1965)

Campbell v. United States, 174 A 2d 87 (D.C.Mun.App., 1961)

Emburgh V. United States, 164 A 2d 342 (D.C.Mun.App., 1960)

Dickerson v. United States, 130 A 2d 588 (D.C.Mun.App., 1958)

4. An arrest or "seizure" occurs when the individual recognizes that he is in the power of the police officer, even without any actual physical force, physical restraint, or formal declaration, and when the individual submits to such police authority in consequence of such recognition.

Kelley v. United States, 111 U.S.App.D.C. 396; 298 F 2d 310 (1961)

United States v. Jenkins, 276 F. Supp. 958 (D.C.D.C., 1967)

United States v. Mitchell, 199 F. Supp 636 (D.C.D.C., 1959)

5. When a police officer, in the course of investigating suspicious circumstances, has probable cause to believe that the individual being interrogated is armed with a dangerous concealed weapon, the police officer may, for his own self-protection, make a limited search (a "frisk" or "pat-down") of the person of the individual being interrogated even though not having any probable cause to make an arrest and, if such limited search does in fact disclose a dangerous weapon, such weapon is admissible in evidence against the individual.

Terry v. Ohio, 392 U. S. 1 (1968)

6. The police must have probable cause existing at the time of the arrest to believe that the particular offense charged was being committed or about to be committed by the arrested individual, and a detention for interrogation of suspicious circumstances or for a traffic investigation cannot be used as a sham or a pretext to justify an illegal search and subsequent arrest for another and different offense.

Mallory v. United States, 354 U.S. 449 (1957)

> "The police may not arrest on mere suspicion but only 'on probable cause'..." at p. 454.

12 D. C. Code Encyclopoedia. Section 22-3204

> "Par. 10. Arrests, searches and seizures. The question of what circumstances constitute probable cause for the arrest and search...must be resolved on the facts of each individual case, and where probable cause to arrest a person exists, a pistol discovered in the course of such search is admissible in a prosecution under this section...
>
> "...The question is...whether as a practical matter a man of ordinary and reasonable caution would have reason to believe that the accused was carrying a gun..."

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UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 22485

UNITED STATES OF AMERICA

v.

ERNEST M. MARSHALL,

Appelant

Appeal from the United States District Court

for the District of Columbia

REPLY BRIEF FOR APPELLANT

John H. MacVey
P. O. Box 303
McLean, Virginia 22101
Attorney for Appellant
(appointed by the Court)

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UNITED STATES COURT OF APPEALS

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REPLY BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

This reply brief for appellant is directed principally to Point I A and Point II of the brief for the Government.

At the outset, however, appellant wishes to emphasize that appellant does challenge by this appeal in this Court the sufficiency of the evidence before the jury in the trial court below. Appellant's Point I in appellant's brief clearly charges reversible error by the trial judge in admitting the 22 calibre revolver and ammunition in evidence. Accordingly, appellant's counsel objects to the entire second sentence on page 2 of the Government's brief on the ground that such statement is incorrect.

Counsel for appellant also respectfully emphasizes that he does not accept the interpretations of the evidence of record made by Government counsel which are at variance with the interpretations of the same evidence made by appellant's counsel. For example,

appellant's counsel also objects to the description in Paragraph 3 of "Issues Presented" of the Government's brief which characterizes the "bulge" as "...a bulge the shape of a weapon..." when the record clearly shows that the object causing the bulge was not identified in the initial stages of the confrontation (R. 19, pp. 40, 52).

STATEMENT OF POINTS

Point 1 - The defendant's right to assert violation of his constitutional protection by the Fourth Amendment against illegal searches and seizures is paramount to a rule of procedure. Accordingly, when facts appear at a trial showing a search and seizure without a warrant, the Government has the burden of proving the legality of such a search and seizure by clear and convincing evidence.

Point 2 - Since the trial judge properly exercised his discretion to entertain defendant's motion to strike the testimony of the two police officers, his judgment denying such motion and admitting the 22 calibre revolver and ammunition into evidence is subject to appellate review and to reversal if the judgment of the trial judge is clearly erroneous on the basis of the entire evidence of record. For the reasons stated in Point I of Appellant's Brief previously filed, the entire testimony of the two police officers concerning the issue of the illegality of the search and seizure is self-contradictory, and such self-contradictory evidence is not "substantial evidence", so that the judgment of the trial judge denying defendant's motion to strike was clearly erroneous on the basis of the entire evidence.

Point 3 - A transcript of the sentencing of the defendant is not available because the court reporter cannot be located.

ARGUMENT

Point 1

The defendant's right to assert violation of his constitutional protection by the Fourth Amendment against illegal searches and seizures is paramount to a rule of procedure. Accordingly, when facts appear at a trial showing a search and seizure without a warrant, the Government has the burden of proving the legality of such a search and seizure by clear and convincing evidence.

Rule 41(e) of the Federal Rules of Criminal Procedure reads as follows:

> "(e) MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." (emphasis supplied)

At the outset, it should be noted that the defendant pled "not guilty" to the indictment (R. 3). Since the defendant was charged with the crime of carrying a dangerous weapon without a license therefor, the not guilty plea in effect was a denial of possession of a weapon, since the defendant did not at any time claim that he had a license to carry a revolver (R. 19, p. 48). Accordingly, if defense trial counsel had made a motion before trial for return of the revolver, he would have been taking inconsistent positions, i.e.,

he would have been claiming by the pre-trial motion possession of a weapon illegally seized from the defendant, while at the same time denying possession of a weapon.

Further, defense trial counsel had decided not to have defendant testify in his own behalf (R. 19, p. 92). Since defense trial counsel was not aware before trial of the decision in Terry v. Ohio, 392 U.S. 1 (1968) (R. 19, p. 61), defense trial counsel also may not have been aware of the decision in Simmons v. United States, 390 U. S. 377 (1968), which, on March 18, 1968, held for the first time that the testimony of a defendant on a pre-trial motion to suppress cannot be used later against the defendant at the trial.

In any event, the filing of a pre-trial motion to suppress is permissive, not mandatory, and a defendant is not required to take inconsistent positions in order to assert his constitutional right of protection under the Fourth Amendment against illegal search and seizure.

The situation here is similar to that in Agnello v. United States, 269 U.S. 20 (1925) where the Government contended that a can of cocaine was admissible in evidence against Agnello, even though obtained by an illegal search, because no application had been made before trial for return of the can of cocaine. The Court held that the can of cocaine was improperly admitted in evidence and remanded the case for a new trial, saying:

> "...It would be unreasonable to hold that he was bound to apply for the return of an article which he maintained he never had. Where, by uncontroverted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained, may not invoke protection of the Fifth Amendment immediately and without any application for the return of the thing seized. 'A rule of practice must not be allowed for any technical reason to prevail over a consitiutional right..." at p. 34.

The decision in Gouled v. United States, 255 U.S. 298 (1921), and the decision in Jones v. United States, 362 U.S. 257 (1960), make clear that the trial judge acted properly in this case by exercising his discretion to entertain defendant's motion to strike the testimony of the two police officers and to take further evidence with respect to the facts of the illegal search and seizure.

In the Gouled Case, supra, the Court said:

> "It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." at pp. 312, 313.

In the Jones Case, supra, the Court said:

> "...This provision of Rule 41 (e), requiring the motion to suppress to be made before trial, is a crystallization of decisions of this Court requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt... As codified, the rule is not a rigid one, for under Rule 41(e) the court in its discretion may entertain the motion (to suppress) at the trial or hearing. This qualification proves that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement..." at p. 264.

It is also well established that the Government has the burden of proving by "clear and Convincing evidence" the legality of the search and seizure when it appears that the search and seizure were made without a warrant, as in this case (8A Moore's Federal Practice, 2d ed., par. 41.08(4); Channel v. United States, 285 F 2d 217 (CCA 9th, 1960)).

Point 2

Since the trial judge properly exercised his discretion to entertain defendant's motion to strike the testimony of the two police officers, his judgment denying such motion and admitting the 22 calibre revolver and ammunition into evidence is subject to appellate review and to reversal if the judgment of the trial judge is clearly erroneous on the basis of the entire evidence of record. For the reasons stated in Point I of Appellant's Brief previously filed, the entire testimony of the two police officers is self-contradictory, and such self-contradictory evidence is not "substantial evidence", so that the judgment of the trial judge denying defendant's motion to strike was clearly erroneous on the basis of the entire evidence.

Appellant's counsel respectfully submits that it is clearly established that, when, as in this case, the trial judge has properly exercised his discretion to entertain a motion to suppress or strike because of an alleged unconstitutional search and seizure, the trial judge must take evidence on such issue and his ruling is reviewable and is subject to reversal if the judge's ruling is "clearly erroneous" on the entire evidence of record (8A Moore's Federal Practice, 2d ed., par. 41.08(4), par. 41.09; Channel v. United States, 285 F 2d 217 (CCA 9th, 1960); United States v. Page, 302 F 2d 81 (CCA 9th, 1962); Schoeprlin v. United States, 391 F 2d 390 (CCA 9th, 1968).

The judgment of the trial judge on a motion to strike or to suppress evidence alleged to have been seized in violation of the Fourth Amendment is "clearly erroneous" where, although there is evidence to support the ruling, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed (5 Moore's Federal Practice, 2d ed., par. 52.03 (1)).

A ruling by a trial judge is clearly erroneous by necessary logic when such ruling is not supported by "substantial evidence". As Dean Wigmore has aptly emphasized,

> "...Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can be reasonably inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences..." (Wigmore on Evidence, 3rd ed., Sec. 2494, footnote 18) (emphasis supplied).

It is therefore established that the appellate court has the duty to review the entire evidence of record in order to determine whether the ruling of the trial judge was or was not "clearly erroneous". As Judge Median cogently stated in Carlo v. United States, 286 F 2d 841 (CCA 2d, 1961),

> "...As we are concerned here with one of the most fundamental and significant of the provisions of the Bill of Rights, we must scrutinize the evidence with meticulous care to make sure that no determination made by us in this case shall constitute any watering down or erosion of the rights guaranteed by the Fourth Amendment...." at p. 843.

The question here is not one involving the problem of review of the trial judge's decision as to the credibility of the two police officers, or their demeanor on the witness stand. Rather, the situation here is basically the same as that existing in Channel v. United States, 285 F 2d 217 (CCA 9th, 1960). There, the Court said:

> "...the relative credibility of witnesses is not the central issue. The real question presented here is whether the testimony of Walton and Bennet (the Federal agents), taken at full value, warrants a finding that Channel freely and intelligently gave his unequivocal and specific consent to the search..." at p. 220 (emphasis supplied).

Obviously therefore, the two cases cited by Government counsel of Harrison and Johnson are not at all applicable to this case because they refer to review of convictions in a criminal trial before a jury (Government's Brief, page 5, footnote).

For the reasons stated in Point I of Appellant's Brief previously filed, if we take the entire testimony of the two police officers at full value with respect to the facts of the allegedly illegal search and seizure in this case, a hopeless and irreconcilable conflict of evidence exists, and such conflict can be eliminated only if some of the testimony of the two police officers is excluded and only some of their testimony given any weight.

In a similar situation where a conflict of testimony existed as to whether a search warrant had been properly executed under Rule 41(e), the Court reversed the conviction and remanded the case for a new trial to resolve such conflict of evidence (Jones v. United States, 362 U.S. 257 (1960)).

For the same reasons, appellant's counsel respectfully submits that the trial judge's ruling admitting the 22 calibre revolver and ammunition into evidence was "clearly erroneous" and that accordingly the conviction of the defendant should be reversed by this Honorable Court.

Point 3

A transcript of the sentencing of the defendant is not available because the court reporter cannot be located.

In reply to Point II in the Government's brief, appellant's counsel respectfully points out that the docket entries in the record before this Court show that the court reporter at the sentencing of defendant was "M. J. Maloney", who is Mrs. Mary Jane Maloney, formerly resident at Apartment 201, 6626 Ronald Road, District Heights, Maryland.

Mrs. Maloney's employment as a court reporter was terminated on April 18, 1969, before appellant's counsel began work on writing appellant's brief. A search for the transcript of the sentencing made by

appellant's counsel was fruitless, and appellant's counsel was advised by the clerk in charge of the criminal records of the U. S. District Court that a transcript of the sentencing has not been filed.

Mrs. Maloney has moved from her former District Heights residence and efforts by appellant's counsel to locate Mrs. Maloney so far have been unsuccessful. For the foregoing reasons, appellant's counsel did not supply a transcript of the sentencing of the defendant.

Appellant's counsel merely reiterates that, where a crime can be transformed from a misdemeaner to a felony and the penalty can be increased tenfold because of prior convictions, then the Government has the duty to prove such prior convictions as required by law and, failing such proof, the defendant should not have been sentenced to more than one year in prison.

Respectfully submitted,

John Holmes MacVey
Attorney for Appellant
(appointed by the Court)

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 1969, I personally delivered a copy of the foregoing Reply Brief of Appellant to the United States Attorney, for the attention of John G. Gill, Jr., at his office in the United States Court House, Washington, D. C.

I also hereby certify that I have on August 25, 1969, delivered a copy of the foregoing Reply Brief of Appellant to a reproducing service and that no changes in the said reply brief to be filed in reproduced form will be made, except for minor changes or corrections.

John H. MacVey
Attorney for appellant